

² The record on appeal includes evidence received after OWCP issued its April 6, 2016 decision. The Board's jurisdiction is limited to the evidence that was in the case record at the time of OWCP's final decision. 20 C.F.R. § 501.2(c)(1). Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

In 1992, appellant, then a 37-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging an injury to her upper extremity on or about December 23, 1987. OWCP accepted the claim for bilateral carpal tunnel syndrome, right lateral epicondylitis, and left shoulder calcifying tendinitis.⁴ On November 25, 2008 OWCP found that appellant's actual earnings as a modified mail processing clerk fairly and reasonably represented her wage-earning capacity.⁵ Appellant subsequently lost her limited-duty assignment due to the employing establishment's National Reassessment Process (NRP).⁶ She failed a claim for wage-loss compensation (Form CA-7) beginning December 2, 2009, which OWCP denied by decision dated October 29, 2010.⁷ The Board subsequently set aside OWCP's denial of wage-loss compensation, and remanded the case for further development to determine whether the loss of limited-duty work under the NRP warranted modification of the November 25, 2008 LWEC determination.⁸

By decision dated April 11, 2013, OWCP denied modification of its November 25, 2008 LWEC determination. It similarly denied modification of its prior LWEC determination by merit decisions dated September 17, 2013, May 28, and September 4, 2014.

On October 1, 2014 appellant again requested reconsideration, which OWCP denied by decision dated March 19, 2015.⁹

Appellant appealed to the Board and, by December 4, 2015 decision, the Board affirmed OWCP's March 19, 2015 decision, finding that OWCP properly considered appellant's

³ Docket No. 00-1097 (issued April 26, 2002); *petition for recon. denied*, Docket No. 00-1097 (issued October 17, 2002); Docket No. 04-1195 (issued February 2, 2005).

⁴ Under OWCP File No. xxxxxx424, appellant also has an accepted occupational disease claim for right trapezius strain.

⁵ OWCP determined that appellant had zero loss of wage-earning capacity (LWEC) because her then-current wages as a modified mail processing clerk exceeded the current wages of her date-of-injury position.

⁶ Effective January 31, 2011, appellant resumed limited-duty work as a general clerk.

⁷ OWCP determined that appellant had not established a basis for modifying the November 25, 2008 LWEC determination. That decision was subsequently affirmed by a representative of OWCP's Branch of Hearings and Review and, in a March 12, 2012 decision, OWCP denied modification of the hearing representative's February 17, 2011 decision.

⁸ Docket No. 12-1001 (issued January 15, 2003).

⁹ Appellant submitted the appeal request form that accompanied OWCP's September 4, 2014 decision. She also submitted a September 19, 2014 letter requesting reconsideration. OWCP received both documents on October 1, 2014.

September 2014 filing as a request for reconsideration of the last merit decision, rather than a request for modification of the November 25, 2008 LWEC determination.¹⁰ The Board further found that appellant failed to satisfy the criteria for a timely request for reconsideration under 20 C.F.R. § 10.606(b)(3).

On January 11 and March 1, 2016 appellant again requested reconsideration. Additional evidence received following OWCP's March 19, 2015 nonmerit decision included July 20 and 21, 2015 bilateral shoulder magnetic resonance imaging (MRI) scans, December 2015 physical therapy treatment notes, and an October 22, 2015 medical report containing work restrictions from Dr. Michael E. Hebrard, a Board-certified physiatrist. Dr. Hebrard noted that he examined appellant and determined that she had functional deficits that have been accelerated in the course of her employment. He opined, "[I]t is my opinion to a reasonable degree of medical certainty on a more probable than not basis, that the patient's ongoing condition is a permanent aggravation of her underlying condition due to the repetitive nature of her job as a mail handler." Dr. Hebrard explained that his diagnostic tests provided objective findings, which were consistent with appellant's clinical presentation with restricted range of motion of the glenohumeral joint, which was evidenced by clinical adhesive capsulitis, *i.e.*, frozen shoulder syndrome and he advised that "[g]iven the type of cumulative trauma that she is exposed to at the job with the repetitive keying and typing and her arms away from her trunk and elevated above shoulder level working at the computer, leads to ongoing cumulative mechanical impingement of the rotator cuff interval, which is consistent with inflammatory changes that she is currently having and also the documented severe degeneration of the labrum." He further opined that appellant had "a chronic disabling condition, which continued to be aggravated in the course of her employment with the job that she was currently involved in as a result of her federal employment with repetitive reaching at and above shoulder level, and also with the ergonomically challenging situation that she has described to me. Dr. Hebrard concluded, "[i]t is my opinion to a reasonable degree of medical certainty on a more probable than not basis that there is a causal relationship between what she has described to me as her work environment and the clinical presentation today." He noted that appellant had issues with carpal tunnel syndrome and clinical presentation was with paresthesias in the median nerve distribution and subsequent weakness on clinical examination and positive provocative testing such as Tinel's tapping only the median nerve on the volar aspect of the distal wrist. Dr. Hebrard recommended physical therapy and an ergonomic work station to reduce the amount of stress on her shoulders. He returned her to work with her previous restrictions. The restrictions included no reaching above shoulder level and no repetitive reaching at or below the shoulder level and no lifting over 10 pounds.

In a December 14, 2015 letter, appellant argued that "[R.M., the employing establishment's health and resource manager,] noted that a grievance was settled [and] appellant was awarded a bid as a general clerk and continued to work in that capacity." She explained that this was not true and that there was no grievance filed pertaining to her need to bid on the general clerk's position. Appellant further explained that she had filed a grievance after receiving the bid and the employing establishment would not allow her to return to work. She argued that the job must be a *bona fide* position, not a temporary one, to qualify for

¹⁰ Docket No. 15-0990 (issued December 4, 2015).

determination of an LWEC. Appellant argued that the job was a temporary, make-shift position. She noted that many grievances had been filed in reference to being put off work. Appellant also argued that no one had addressed her right shoulder, which was included in her claim.

In a letter dated January 4, 2016, appellant argued that the Board's December 4, 2015 decision "was not based on facts." She requested reconsideration of all decisions pertaining to this claim." Appellant repeated her arguments contained in previous correspondences.

In a letter dated February 24, 2016, received on March 1, 2016, appellant requested reconsideration of her LWEC determination. She provided and referred to a vacancy notice bid assignment dated August 10, 2010 for Clerk Craft No. 27979 and job ID #96682843. Appellant explained that the position was vacated by P.W. and she was the successful bidder. She argued that it was not a true statement, as claimed by R.M., that a grievance was settled and she had then been awarded a bid as a general clerk and continued to work in that capacity. Appellant explained that her grievance was filed months after the bidding took place. She argued that R.M.'s statement caused her unnecessary pain and suffering as well as physical and financial pain over the years. Appellant argued that she was not allowed to go back to work despite being the successful bidder. She indicated her grievance date was February 2011. She also indicated that the supervisor and grievance specialist, F.G., confirmed that the modified-duty position was "make-shift work, not necessary, and that the tasks were assigned to employees/workers with bids as the reasons it terminated." Appellant also explained what a real job was, which included having an I.D. number, occupational code, and job descriptions. Furthermore, they were vacated and or abolished and not terminated unless the employees quit or were fired, and then the bid was reposted. She argued that was not her case and they issued an LWEC and then the "job terminated because it was not *bona-fide*." Appellant reiterated that she bid to get back to work from December 2, 2009 until January 9, 2011 and she was the successful bidder. She again questioned what happened to the right shoulder aspect of her claim.

By decision dated April 6, 2016, OWCP denied appellant's "[January 11, 2016]" request for reconsideration, finding that the evidence submitted was insufficient to warrant review of the "[December 4, 2015]" decision. It found that the evidence was cumulative and repetitive and thus substantially similar to evidence or documentation already contained in the case file and previously considered.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation and it provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.¹¹

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 USC § 8128(a). As one such limitation, 20 CFR § 10.607(a) provides that an

¹¹ 5 U.S.C. § 8128(a).

application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹²

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.¹³ Timeliness is determined by the document receipt date of the reconsideration request (the received date in the integrated Federal Employees Compensation System (iFECS)). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.¹⁴

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.¹⁵

The term clear evidence of error is intended to represent a difficult standard.¹⁶ If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹⁷

ANALYSIS

The only decision before the Board in this appeal is the April 6, 2016 OWCP decision denying appellant's request for reconsideration, a decision which found that the evidence of record was insufficient to warrant a merit review. The Board finds that the case is not in posture for decision.

The Board notes that on November 25, 2008 OWCP found that appellant's actual earnings fairly and reasonably represented her wage-earning capacity. In merit decisions dated April 11 and September 17, 2013, and May 28 and September 4, 2014, it denied her requests for modification of the LWECD determination. Appellant again requested reconsideration on January 4, 2016, although her request was received on January 11, 2016. Appellant repeated her request for reconsideration on February 24, 2016. As a general rule, if a formal LWECD

¹² 20 C.F.R. § 10.607(a).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.b (October 2011).

¹⁴ *Id.* at Chapter 2.1602.4.b (October 2011).

¹⁵ 20 C.F.R. § 10.607.

¹⁶ *Supra* note 13 at Chapter 2.1602.5.a (October 2011).

¹⁷ *Id.* at Chapter 2.1602.5.b.

determination has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In that instance, the claims examiner should evaluate the request according to the customary criteria for modifying a formal LWEC.¹⁸ Nonetheless, in cases where arguments submitted have previously been addressed by OWCP and in which a claimant submits no new or relevant evidence, OWCP may address the request under the provisions found in section 8128 of FECA and deny merit review.¹⁹ The Board finds that OWCP properly handled this case as a request for reconsideration rather than a request for modification of the LWEC determination.

The last merit decision was issued on September 4, 2014. As the appeal rights attached to that decision explained, appellant had one-calendar year from the date of that decision to ensure receipt by OWCP of any reconsideration request. OWCP received appellant's January 4, 2016 request for reconsideration on January 11, 2016. Appellant repeated her request for reconsideration on February 24, 2016. As the received date was more than one year beyond September 4, 2014, appellant's request must be considered untimely. The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.

In denying appellant's reconsideration request, OWCP applied the standard of review for timely requests for reconsideration.²⁰ As OWCP applied the incorrect standard of review to the untimely request for reconsideration, the Board will set aside OWCP's April 6, 2016 decision and remand the case for proper review under the clear evidence of error standard as required by regulations.²¹

CONCLUSION

The Board finds that OWCP improperly denied appellant's January 11, 2016 reconsideration pursuant to 5 U.S.C. § 8128(a).²²

¹⁸ *Katherine T. Kreger*, 55 ECAB 633 (2004).

¹⁹ *A.P.*, Docket No. 14-0851 (issued September 2, 2014). *See also G.A.*, Docket No. 14-1505 (issued November 5, 2014).

²⁰ *H.L.*, Docket No. 13-2077 (issued March 20, 2014) (the Board set aside and remanded the case on the grounds that appellant's request was untimely and its generic decision failed to discuss or evaluate the particular evidence and argument appellant presented to support her request).

²¹ *See* 20 C.F.R. § 10.607(b).

²² On appeal appellant essentially repeated her arguments from her reconsideration requests. However, the case is not in posture for decision. Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further consideration under the clear evidence of error standard.

Issued: January 25, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board